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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-186

NADINE GODSY,
Appellee,

vs.

SHERMAN M. GODSY, JR.,
Appellant.

APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

MOTION OF APPELLEE NADINE GODSY TO DISMISS

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-186

NADINE GODSY,
Appellee,

vs.

SHERMAN M. GODSY, JR.,
Appellant.

APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

MOTION OF APPELLEE NADINE GODSY TO DISMISS

Appellee Nadine Godsy, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss the appeal in the above entitled case on the grounds (a) that the appeal does not present a substantial federal question, and (b) that the federal questions sought to be raised were not timely or properly raised or expressly passed on by the courts below.

STATEMENT OF CASE

This case is a divorce action initiated by the appellee in the Circuit Court of Jackson County, Missouri, on July 7, 1971. After nearly one and one-half years of postpone-

ment the case was set for a special hearing on February 15, 1973, at the request of appellant's trial counsel and with the consent of appellee's counsel. The docket notices mailed to both parties by the Circuit Clerk's office mistakenly listed the case under "Motions to Modify"; nonetheless, both counsel for appellant and appellee understood that the hearing was to be a trial on the divorce itself, as set out in the affidavit of appellant's trial counsel filed with the court on February 23, 1973 (Appendix A). The trial record reveals that appellant's trial counsel had been advised *by the court* that the case would be specially set on February 15, 1973 (Appendix B). On the day of the hearing, appellant's counsel was out of town on vacation and had an office associate appear for him to request a continuance. The continuance was denied and the trial court advised the associate counsel as follows: "You can tell the others what we are going to do. The court will deny the request. I am going to hear it in the absence of the defendant. I don't believe he wants to have it heard. He isn't in good faith at all here. . ." (Appendix B). Thereafter a hearing on the divorce was held and appellee was granted a divorce, judgment for $110,352.00 in alimony, attorney fees, and suit money, along with child support of $150.00 per week and custody of the minor child (Jurisdictional Statement, Appendix A, pp. 11-12).

Appellant timely filed a Motion for New Trial which was overruled on March 16, 1973, by the trial court (thereby divesting the trial court of jurisdiction under the long-established procedure and rules of Missouri courts), and appellant thereafter filed an untimely Notice of Appeal. Both sides briefed and argued the issues before the Missouri Court of Appeals, Kansas City District, and the appeal was dismissed on March 3, 1975. The Court

of Appeals held that it was without jurisdiction due to appellant's failure to file notice of appeal within the ten-day time limit prescribed by Missouri law (Jurisdictional Statement, Appendix A, p. 13). Appellant now complains that he was not given notice of dismissal by the Court of Appeals and hence was denied due process of law, despite the fact that he was allowed to brief and argue all issues presented by the appeal, and simply chose not to confront the issue of the jurisdictional defect. Motion for Rehearing and for Transfer to the Supreme Court of Missouri was made and denied (Jurisdictional Statement, Appendix D, p. 27). Thereafter, appellant's Application for Transfer to the Supreme Court of Missouri was denied on May 12, 1975 (Jurisdictional Statement, Appendix D, p. 28).

ARGUMENT

There Is No Substantial Federal Question Presented

Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257 (2), by appeal from the state court, or alternatively, under 28 U.S.C. §1257 (3), by writ of certiorari. In either case the "appeal" must present a substantial federal question, *Cross* v. *Bruning*, 413 F.2d 678 (C.A. 9, 1969); 28 U.S.C.A. §1257 (2) and (3). None is presented here. Briefly stated, the issues raised by appellant are:

1) Whether the failure of the Missouri Court of Appeals to give notice of dismissal denied appellant due process.

2) Whether the Circuit Court denied appellant due process by entering a default judgment without sufficient notice and opportunity to be heard.

It should be noted that appellee does not dispute the fact that appellant had no *special notice* of the dismissal of appeal, but appellee does dispute the factual allegations as presented to this Court by the appellant regarding notice and opportunity to be heard at the trial court. Appellant seeks to claim lack of notice and opportunity to be heard at the divorce trial on the basis of the docket notice which listed this matter for hearing on "Motions to Modify", despite the affidavit of trial counsel for appellant that acknowledges proper notice of *trial*. Appellant had sufficient notice and opportunity to be heard, but, by and through his counsel, simply failed to take advantage of that opportunity.

None of the cases cited by appellant regarding due process compare even remotely to the facts and circumstances presented here. Appellee concurs with the broad statements quoted by appellant in his Jurisdictional Statement regarding the virtue of, and necessity for, notice and opportunity to be heard. In this case however, it was not the lack of procedural safeguards that plagued this appellant; rather it was his own misuse and neglect in adhering to those procedural safeguards that brings appellant to this Court.

I. The Dismissal by the Missouri Court of Appeals Did Not Violate Appellant's Rights Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Appellant, by and through his counsel, briefed and argued this case before the Court of Appeals on issues of his own choosing, yet he now complains because the order of dismissal dealt with another issue. The Court of Appeals, conscious of its own limited grant of authority, decided the case on the threshold question of jurisdiction.

Appellate jurisdiction cannot be conferred upon Missouri courts by any means other than those prescribed by statute, and the courts of Missouri have consistently, and frequently, held that a court must consider jurisdiction of its own volition, and consent of the parties, either express or implied (by failing to argue or raise the issue), cannot create authority which does not exist. *Seiter* v. *Tinsley*, 503 S.W.2d 38 (1973); *Dudeck* v. *Ellis*, 376 S.W.2d 197 (1964); Section 512.020, Missouri Revised Statutes; and Missouri Rules of Civil Procedure 41.02 and 81.01. There being no constitutional (federal or state) right to an appeal, the courts of Missouri can only operate within the confines of their statutory grant of authority. *Griffin* v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *Byers* v. *Zuspann*, 257 S.W.2d 384 (1953); *Hance* v. *Johnson, Stephens and Shinkle Shoe Co.*, 306 S.W.2d 80 (1957); *Dombroski* v. *Cox*, 431 S.W.2d 680 (1968); Section 512.050, Missouri Revised Statutes. Furthermore, no Missouri court is authorized to enlarge the time for taking an appeal or for filing a motion for a new trial, Missouri Rules of Civil Procedure 44.01(b), 78.04, 81.04; Section 510.340, Missouri Revised Statutes. Taking an appeal requires filing a notice of appeal within ten days after final judgment, Missouri Rules of Civil Procedure 81.04; Section 512.050, Missouri Revised Statutes, or by seeking a special order within six months of final judgment under the procedure set out in Rule 81.07(a); Section 512.060, Missouri Revised Statutes. However, this appellant failed to comply with these procedural rules and thereby precluded the Court of Appeals from ever acquiring jurisdiction.

Appellant, through counsel, was quite familiar with the above-mentioned rules, and as such had, at the very least, constructive notice that his appeal would be dismissed. Appellant contends, however, that the Court of

Appeals denied him due process of law by failing to provide him with a special notice of dismissal. Rule F.01, of the Special Rules of the Missouri Court of Appeals, Kansas City District (there being no similar provision in the Special Rules of the St. Louis or Springfield Districts), provides that a party in violation of the rules may be granted leave "to remedy the defect or failure upon good cause shown" (Jurisdictional Statement, Appendix C, p. 19). The notice provision of the rule is provided since there is no formal dismissal docket published. Appellee has been unable to find any reported decisions construing Rule F.01 (it became effective on January 1, 1974), but it seems obvious that it was intended to exculpate the appellant who erred by filing in an improper form (for example: indexing and typewritten documents), or by omitting necessary documents. Interpreted as such, there *was no violation* of Rule F.01—appellant is apparently trying to stick the proverbial round peg into a square hole. Appellant's violation was such that it would have been impossible for him to "remedy the defect or failure". It is obvious that any further notice (there already having been opportunity to brief and argue the case) would have provided appellant with an opportunity for absolutely nothing. The Court of Appeals had before it all salient dates of filing motions and notice of appeal, leaving it with the simple task of merely counting the days.

The order of dismissal was mandatory, and there were no rights, federal or state, denied this appellant. It is respectfully suggested that it is not for this Court to consider the various theories appellant advanced on Motion for Rehearing and Application to Transfer to the Supreme Court of Missouri. This Court has often held that it will not substitute its interpretation of state procedure for that of the state courts. *Patterson* v. *Alabama,* 294 U.S. 600, 55 S.Ct. 575, 79 L.Ed. 1082 (1934).

Assuming in the alternative, that this Court would decide that a federal question is presented here, the appeal must still fail. The federal courts, like the Missouri courts, restrict the time within which appeal may be taken (Federal Rules of Civil Procedure, Rule 73 (a), and Supreme Court Rules 11 and 13). If it were otherwise, there could be no finality of judgments, no orderly administration of justice, no "definite point of time when litigation shall be at an end," *Matton Steamboat Company* v. *Murphy,* 319 U.S. 412, 63 S.Ct. 1126, 87 L.Ed. 1483 (1943). The judgment appealed from herein rests on independent and adequate state grounds, and there has been no subterfuge to evade a federal question under color of state procedure. *Henry* v. *Mississippi,* 379 U.S. 443, 85 S.Ct. 1322, 14 L.Ed.2d 263 (1965); *Herb* v. *Pitcairn,* 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945); *Patterson* v. *Alabama,* supra; *Monger* v. *Florida,* 405 U.S. 958, 92 S.Ct. 1163, 31 L.Ed.2d 236 (1972), dissenting opinion.

Appellee respectfully suggests that any federal question regarding notice of dismissal as alleged, if even present, is best characterized as frivolous.

II. The Trial Court's Application of Rule 61.01, Missouri Rules of Civil Procedure, Did Not Violate the Rights of Appellant Under the Fourteenth Amendment to the United States Constition, in That Appellant Was Not Denied Notice and Opportunity to Be Heard.

Appellant contends that a substantial federal question is presented because the trial court entered a default judgment without appellant-defendant, or his counsel, being present, and further, that trial counsel was not given notice of the hearing of February 15, 1973. Again, the Court's attention is directed to the affidavit of trial counsel (Ap-

pendix A) wherein he acknowledges notice of a "trial date" on February 15, 1973. In reality, if it were not for a clerical error in listing the case under "Motions to Modify", appellant would be without an excuse of any kind insofar as notice. Trial counsel was fully aware of the trial date, and the *true nature* of that proceeding, and the listing error has simply provided appellant with an after-the-fact opportunity to try and salvage what he can. The Missouri courts did not buy it and neither should this Court.

Appellant appeals this issue under the auspices of Rule 61.01 of the Missouri Rules of Civil Procedure, which authorizes the trial court to strike a party's pleadings and enter a default judgment if that party fails to properly proceed with discovery (Jurisdictional Statement, Appendix C, pp. 19-21). The alleged deficiency of Rule 61.01 is that there is no provision for notice. The absurdity of this reasoning is obvious after an examination of Rule 61.01 - - - the Rule *exists* to provide the trial judge with the authority to take action against a party that, after having ample notice, chooses not to avail himself of his day in court or his opportunity to be heard. A reading of the trial transcript, and particularly the pre-trial conference in chambers with The Honorable Circuit Judge Lewis Clymer, puts the situation in its proper perspective (Appendix B). Petitioner-appellee had been prejudiced by numerous continuances and delays. Judge Clymer, being aware of this, properly exercised his discretion by denying the continuance sought by appellant. Missouri Rule of Civil Procedure 65.01 (Appendix C) provides that the court *may* continue an action until a later date for good cause shown, but the request must be in writing and by affidavit unless the adverse party consents (Appendix D; here there was no written request, no affidavit, and no consent, see

Appendix B, p. 17). Missouri courts have held, consistently, that "acts of the trial judge in controlling his docket and the progress of litigation and in the granting or denying of continuances are discretionary." *State ex rel. Schaper* v. *Stassie*, 487 S.W.2d 49 (1972); *Searles* v. *Searles*, 495 S.W.2d 759 (1973); *Krieber* v. *Krieber*, 420 S.W.2d 326 (1967). The absence of defendant's counsel, in and of itself, does not compel continuance, *Clinton* v. *Clinton*, 444 S.W.2d 677 (1969); *Carr* v. *Carr*, 308 S.W.2d 357 (1957). This allegation presents no federal question at all, as there was both notice and an opportunity for the appellant to be heard.

The Questions of Due Process Violations Were Not Properly Raised or Decided by the Courts Below

Appellant has invoked the jurisdiction of this Court by tailoring his allegations of due process violations to fit within 28 U.S.C. §1257 (2) and/or (3). Namely, that the highest court of Missouri, in which a decision could be had, upheld the constitutionality of a state statute or rule challenged by appellant. Appellant states at page 6 of his Jurisdictional Statement that the issues raised here (the unconstitutionality of Rule 61.01, Missouri Rules of Civil Procedure, and Rule F.01 of the Special Rules of the Missouri Court of Appeals, Kansas City District), were "raised and denied" in the Missouri courts. The issues were allegedly raised in appellant's Motion for Rehearing and Application to Transfer From Court of Appeals to the Supreme Court, filed March 18, 1975 (Jurisdictional Statement, Appendix D, pp. 22-26), but an examination of that motion reveals otherwise. Considered individually, the following reflects the extent to which appellant "raised" the issues herein below:

RE: Rule F.01

Paragraph 1 of the above-mentioned Motion for Rehearing and Transfer states: "Rule F.01 provides that reasonable notice be given the parties prior to the dismissal. There was no notice given in this case and this court should set the matter for rehearing" (Jurisdictional Statement, Appendix D). That is all; there is nothing more. Appellant goes on to argue alternate theories under the facts and Missouri law, but to say that the bare recitation quoted above "raised" the question of the constitutionality of Rule F.01, requires more imagination than this Court should interject.

RE: Rule 61.01

The Rule is not mentioned, cited, discussed or even alluded to anywhere in the Motion for Rehearing and Transfer. Nor does it appear in Appellant's Brief on the original appeal to the Missouri Court of Appeals. Appellee respectfully suggests that it would be extraordinarily difficult for this Court to accept this appeal in light of the restraints placed on its jurisdiction by 28 U.S.C. §1257.

In *Cardinale* v. *Louisiana,* 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969), Justice White's opinion for this Court stated both the law and the reasoning that should control in this case:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell* v. *Randell,* 10 Pet. 368, 9 L.Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with *Owings* v. *Norwood's Lessee,* 5 Cranch 344, 3 L.Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, Sec. 25, 1 Stat. 85,

> vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion, [citations], and since. . . [citations omitted].
>
> [T]here are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor* v. *Ohio,* 385 U.S. 92, 87 S.Ct. 252, 17 L.Ed.2d 189 (1966), they should be given first opportunity to consider them."

Additional authority for appellee's position may be found in: *Murdock* v. *City of Memphis,* 20 Wall. 590, 22 L.Ed. 429 (1875); *Bailey* v. *Anderson,* 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 (1945); *Street* v. *New York,* 394 U.S. 580, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

Appellant relies upon the cases of *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), and *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U.S. 313, 50 S.Ct. 326, 74 L.Ed. 870 (1930), to support the opposite view. However, neither of those cases should control as both are distinguishable on the facts. In *Brinkerhoff* the constitutional issues be-

fore this Court were in fact seasonably raised at first opportunity in the courts below (unlike the case at hand), and the plaintiff was denied an opportunity to be heard when the courts below, although having the power, denied plaintiff access to the judiciary because of plaintiff's failure to first seek an administrative remedy which was in fact never available (here appellant had actual notice and opportunity to be heard, and the appellate courts never had jurisdiction). In *Missouri Ins. Co.* the state court did indeed have an opportunity to consider the issue upon which the appeal to this Court was taken, as it was specifically raised by the relator at the first opportunity. Such is not the case here.

CONCLUSION

Appellee respectfully submits, therefore, that this appeal presents no federal question on the basis of the record itself, or alternatively, that any such question is not substantial in light of the state's compelling interest in maintaining its fundamental judicial procedure, and further, that the issues of challenge set before this Court were not raised or passed upon below. The appeal should be dismissed.

Respectfully submitted,

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APPENDIX A

Affidavit of Trial Counsel

AFFIDAVIT

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

Robert C. Jones, after first being duly sworn upon his oath, states that he is the attorney of record for the defendant in the above matter and that this cause has been set for hearing on numerous occasions, some of which the defendant was not ready for trial, some of which the plaintiff was not ready for trial and so announced, and some of which both parties were ready for trial but the Court could not hear it because of the large docket of contested cases; that there had been numerous motions and hearings on said motions and that on or about the 10th day of January, 1972, the last time a motion was scheduled, both parties announced that they were ready to hear the motion but that as a result of conferences between the parties, it appeared that the entire matter could be worked out without the necessity of a hearing or trial and that both parties so advised the Court, and that following this time several conferences were held between the attorneys and several written proposals and counter-proposals were exchanged between the attorneys in an effort to resolve the matter; that at some time prior thereto the parties had agreed to a February 15th trial date but that during this period of negotiations and following the parties' announcement to the Court that they believed the matter could be resolved without trial, the affiant addressed Miss Mary Wren, Domestic Relations

Clerk, under date of January 23rd that it appeared the matter could be resolved without trial and to remove it from the docket, and with a tacit understanding of the parties the matter would not be tried this affiant made arrangements to be out of town on February 15th.

That accordingly the matter was removed from the trial docket as a contested divorce for February 15th, but that on said day the attorney for the plaintiff appeared in Court, and although negotiations toward settlement of the matter was still in progress, requested this Court to enter a default judgment against the defendant when he was not in Court and when the affiant, his attorney of record, was out of town and neither parties could present the defense to the plaintiff's action.

The above statement is true to the best of my information, knowledge and belief.

.....

Affiant

Subscribed and sworn to before me this ..... day of February, 1973.

.....

Notary Public

My Commission Expires: .....

APPENDIX B

Transcript of Proceedings in Chambers and Initial Proceedings in Open Court (Feb. 15, 1973)

(Page 6, line 23 through page 14, line 5)

On Thursday, February 15, 1973, the following proceedings were had and entered of record:

(The following proceedings were had IN CHAMBERS and entered of record.)

THE COURT: This is the case of Godsy vs. Godsy?

MR. SIMMS: Yes, Your Honor.

THE COURT: Plaintiff is here by counsel and defendant is appearing by Jack L. Simms.

MR. SIMMS: Your Honor, I am Jack L. Simms, and I am appearing in this matter especially for Mr. Robert C. Jones, attorney of record in this case. It is Mr. Jones' case, I know absolutely nothing about it. It has been pending for quite sometime. It was imparted to me that there had been some sort of a settlement that had tentatively been accepted and that motions pertaining to the case were not argued on account of that; that immediately thereafter, Mr. Jones made arrangements to depart on a vacation and will return the first part of the week of the 19th, which I believe is Washington's birthday, and will be ready to try this case at any time thereafter.

I am requesting the Court at this time for a continuance of the case until Mr. Jones can return to handle and properly try the case. Mr. Jones has indicated to me in writing that he is the only one that is qualified, because of the background of the case to try it, and because of my physical condition, having just gotten out of the Veterans Hospital, with double pneumonia, I am not in condition, nor am I familiar enough with the file to try

the case, and I have been so instructed not to try cases by my personal physician. That is the record that I wish to make. We are talking about a matter of a few days. There is background in this case that I am not familiar with and I am requesting that the case be continued to be tried immediately upon return of Mr. Jones, the first part of the week.

MR. KRENSKY: Your Honor, the plaintiff opposes any application for continuance of the trial on the grounds that this case was set down for special hearing chosen by Mr. Jones. It was agreed upon by me at that time.

Mr. Jones stated that the day would be set aside, that there would be no further delay and that the matter would be disposed of at this time.

Previously, there has been six to eight continuances of this case over the past fourteen months. When this case was set, the Court further instructed the defendant to make certain child support payments and alimony payments and to return a car that he had taken that she had been previously using up until the time he took it. Since that time the man has paid nothing, has not returned the car and has told the plaintiff that he doesn't intend to pay anything. She will be an old woman before it is tried.

This very day the plaintiff has a banker under subpoena and the defendant telephoned Mr. Prouty and told him he didn't need to come to court because the matter wouldn't be heard and that he didn't need to worry about Mr. Krensky's subpoena because the matter would never be tried.

The settlement was a tentative settlement that was offered by the plaintiff and accepted by the defendant. Subsequently three weeks afterwards the defendant had not acted upon it and at that time Mr. Jones and I had a discussion as to when he would act upon it and I was

informed that it had fallen through even though it had been agreed upon.

Mr. Jones called Mary Wren and told her it was settled and to take it off the docket. I advised this court that the matter was not settled and should be left on the docket and sent a strongly worded letter to Mr. Jones to that effect.

We have made further attempts to get child support but there was no success and we have had no success in getting the automobile returned.

Last Thursday I received a letter from Mr. Jones stating he hoped I would not object to a continuance, that he was going on his winter vacation to Hawaii and I wrote him a letter and hand carried it to the office and it was placed in Mr. Jones' hands. He read it and made no comment and my letter said that I did not understand and opposed a continuance and that I would appear in court ready to try the matter and would urge the Court to allow us to try the matter.

I talked to Gene McDaniel on Monday and was informed by him that Mr. Jones had left town and I told Gene we would be here prepared to try the case.

This is not a statutory ground to continue a case because a lawyer is on vacation and from a personal standpoint I would not oppose a continuance for such reason had this matter not been delayed so many times in the past and I don't know when the plans materialized to take this vacation. The letter Mr. Jones sent me saying he was going on vacation was dated the 2nd and mailed on the 7th of February and I asked him about it; that we may have been able to advance the case up a week and Mr. Jones said, "Well, that is the way it happens in this office. Things don't get mailed out promptly."

The plaintiff is suffering from want of money. She has received second and third notice of utilities being

shut off, she is without a car, she owes the bank, the baby-sitter, she has borrowed money to live on. This matter will not get any better until it is tried.

MR. SIMMS: For the record, may I ask you a question based upon what we have talked about heretofore, and for my own self-satisfaction, had it been myself who requested this continuance and told you it would be tried the first part of next week, would you oppose that?

MR. KRENSKY: No.

MR. SIMMS: I believe that is all I have for the record, Your Honor.

THE COURT: What was your offer again?

MR. SIMMS: I asked him if it had been myself who requested the continuance and that it would be tried the first part of next week, would he oppose the continuance, and he said, "No."

MR. KRENSKY: I would take Jack's word if he said he would try this case next week or next month.

THE COURT: Gentlemen, the Court feels this matter should be tried. The record does reflect that it has been continued a number of times at the request of both parties. The case came from Independence on the 5th of December. The Court recalls the conference in chambers with the attorneys and at the bench where both the plaintiff and defendant were present and it was my understanding the defendant would bring up to date his child support payments, which at that time amounted to something like $1500.00. The order was made in court 1/29/72. He has not yet done it and he also promised he would share some of these automobiles. He seems to me to be in contempt of the court. I think we should go ahead with the case if Mr. Krensky is demanding that it be heard today.

I am not blaming you, Mr. Simms. You can tell the others what we are going to do.

The Court will deny the request. I am going to hear it in the absence of the defendant. I don't believe he wants to have it heard. He isn't in good faith at all here and, as I understand it, the fellow is in a position to pay.

Mr. Hunsucker, there is a motion for your fees, isn't there?

MR. HUNSUCKER: Yes, Your Honor, the temporary allowances was heard before Judge Randall and he made the child support and alimony allowances.

MR. SIMMS: Very well. Thank you, Your Honor.

BE IT REMEMBERED that heretofore on Thursday, February 15, 1973, the above cause came on regularly for hearing before the Honorable LEWIS W. CLYMER, Judge of Division No. 8 of the Circuit Court of Jackson County, Missouri, sitting as Division "B" of Domestic Relations.

The Plaintiff appeared in person and was represented by her attorney, Mr. Frank Krensky.

WHEREUPON, the following proceedings were had and entered of record:

THE COURT: This is the case of Godsy vs. Godsy, and the Court heretofore has allowed a record to be made in chambers at which time Mr. Jack Simms appeared on behalf of Mr. Jones, who is counsel of record for the defendant, and at that time requested a continuance. The file reflects, of course, that Mr. Jones is not in the city and a letter is in here from him where he says he will be away and couldn't be here and that he is under the impression that a settlement would be reached.

On the other hand, Mr. Krensky says that is not so. The Court is not satisfied with the handling of this. It was set especially at this time at the agreement of both counsel and I expected him to be here. We excused Mr. Simms because of his illness and his unfamiliarity with

the case and the request has been denied and the Court will proceed with hearing this case with the defendant not being present nor counsel being present.

MR. KRENSKY: Your Honor, at this time, there are some preliminary motions pending before the Court, can we dispose of them at this time?

THE COURT: All right.

APPENDIX C

Rule 65.01, Missouri Rules of Civil Procedure

65.01 Court May Continue a Civil Action to a Fixed Day

For good cause shown, the court may continue a civil action to a fixed day, or to a date for trial to be set thereafter. Every continuance granted on the application of a party may be at the cost of such party, if so ordered by the court.

APPENDIX D

Rule 65.03, Missouri Rules of Civil Procedure

65.03 Application for Continuance, How Made

An application for a continuance shall be made by a written motion accompanied by the affidavit of the applicant or some other credible person setting forth the facts upon which the application is based, unless the adverse party consents that the application for continuance may be made orally.